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LEGAL RIGHTS UNDER THE CLAYTON-BULWER TREATY.

SOON after the establishment of the independence of the Spanish-American republics, the United States, as well as several European States, were occupied with schemes for constructing a ship canal across the isthmus which connects the continents of North and South America. Among other documents of this period bearing on the subject, we may mention, as instructive, a resolution of the Senate, adopted in 1835, requesting the President to enter into negotiations with the governments of other nations, and especially with those of Central America and New Granada, with the view of securing the free navigation of any canal that might be constructed across this isthmus. In concluding a new treaty with New Granada, on the 12th of December, 1846, the United States government succeeded in introducing an article (the thirty-fifth) giving effect to this resolution of the Senate.

By this article the government of New Granada (since 1862, the United States of Colombia) guaranteed "to the government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the government and citizens of the United States," etc. And the "United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality

of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

"The present treaty shall remain in full force and vigor for the term of twenty years from the day of the exchange of the ratifications." . . . But, "notwithstanding the foregoing, if neither party notifies to the other its intention of reforming any of, or all, the articles of this treaty twelve months before the expiration of the twenty years stipulated above, the said treaty shall continue binding on both parties beyond the said twenty years, until twelve months from the time that one of the parties notifies its intention of proceeding to a reform."

The acquisition of California by the United States, in 1848, and the subsequent discovery of gold in that territory, gave an increased interest to the projects for cutting the Central-American isthmus, and thus shortening the water route to our western coast. In this same year, Aspinwall, Stephens, & Co. obtained from the government of New Granada the concession of the right of way for a railway across the Isthmus of Panama. The next year, 1849, Vanderbilt and others formed at New York a company called "the American, Atlantic, and Pacific Company," to whom the government of Nicaragua granted the right to construct a ship canal across the territory of that State.

At about the same time—June, 1849—Mr. Hise, the diplomatic agent of the United States in Central America, concluded a treaty with Nicaragua, but without instructions from his government, by which the United States were to exercise exclusive dominion over any route through the territory of that State. This treaty was never ratified by the United States, but it had some influence upon the negotiations with England which were entered upon subsequently.

At this time the Nicaragua route was thought to be the most feasible one for a ship canal, for the reason that Lake Nicaragua and the San Juan river might, it was believed, be made use of for a part of the way. But an obstacle to the free use of this route now presented itself, in the fact that the mouth of the San Juan river, and hence the eastern terminus of the proposed canal, was

under the dominion of England. She had recently taken possession of the small town of San Juan del Norte, situated at the entrance to the above-named river, and had changed its name to Greytown, raising over it what was declared to be the Mosquito flag. The alleged ground of this action was, that this place was a part of the territory of the Mosquito Indians, over whom England had, it was asserted, exercised a protectorate for two hundred years. The so-called Mosquito coast extended indefinitely several hundred miles along the coasts of the republics of Honduras and Nicaragua. England had, moreover, a settlement on the main-land, farther to the north, called British Honduras, or Belize; she also laid claim to the Bay Islands, situated in the Bay of Honduras, as dependencies of Belize.

The government of the United States, alarmed at this preponderance of British influence in Central America, cast about for the means of counteracting it. To oust England from her strong position by force was felt to be much too grave an undertaking, even were the United States disposed to attempt it. But the American statesmen of that day were, as a rule, only intent on securing a free transit across the isthmus not under the exclusive control of any European nation. They resolved, therefore, upon a peaceful and conciliatory policy: if England could not be got rid of, yet she might consent to act in conjunction with the United States in guaranteeing the proposed isthmus transit. Accordingly, the English government was invited, through Mr. Abbott Lawrence, American Minister in London, to join the United States in the protectorate of the Panama route, as set forth in the thirty-fifth article of the treaty of 1846 with New Granada; and also to enter into a treaty with Nicaragua similar to that negotiated by Mr. Hise, which was then in the hands of the President. The condition attached to this proposal was, however, that the Mosquito protectorate should be withdrawn by England. In the event of this proposal not being accepted, it was further intimated, probably as a mild threat, that the Hise treaty would be submitted to the Senate for its approbation. The subsequent negotiations in regard to this question were transferred to Washington, and carried on by Mr. Clayton, Secretary of State, and Sir Henry Lytton-Bulwer, the English Minister at Washington. The result was a direct treaty between the two parties, signed April 19, 1850, and since known as the Clayton-Bulwer treaty.

By the first article of this treaty the two governments agree that "neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal (by the Nicaraguan route); agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same." And, further, neither will seek to obtain any advantage not freely accorded to the other.

By Article II. it is agreed that, in the event of war between the contracting parties, vessels traversing the canal shall be exempt from blockade or capture by either belligerent; and this provision shall extend to a distance, from either end of the canal, which may be hereafter found expedient.

By Article V. the two governments engage to guarantee the neutrality and security of the canal, when it shall have been constructed, but either party is at liberty to withdraw from this agreement of protection on giving six months' notice to the other.

Article VI. contains a stipulation that the contracting parties shall "invite every other State with which both or either have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other, to the end that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated." Also that "each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention; namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all, and of protecting the same."

Article VII. gives priority of claim to protection to any such persons or company "as may first offer to commence the same, with the necessary capital," etc.

By Article VIII. "the governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama."

At the time of the execution of this treaty England claimed, as we have seen, dominion over (1) the Mosquito coast, (2) British Honduras, (3) the Bay Islands. Before the final exchange of ratifications of the treaty, Sir H. L. Bulwer filed a paper at the State Department in Washington declaring that "Her Majesty does not understand the engagements of that convention to apply to Her Majesty's settlement at Honduras, or to its dependencies."

Mr. Clayton answered, in a note of July 4, acknowledging that he "understood British Honduras was not embraced in the treaty of the 19th day of April last, but at the same time declining to affirm or deny the British title in their settlement or its alleged dependencies." He says further, "The consent of the Senate was not required, and the treaty was ratified as it stood when it was made."

England then renounced her dominion over Greytown, but continued to exercise a protectorate over the Mosquito Indians; and shortly after the ratification of the treaty, proceeded to erect the Bay Islands into a separate colony. This, the United States contended, was a direct violation of the stipulations of the treaty; and immediately thereupon a controversy arose in regard to the interpretation of the treaty. The British government took the position that the first article of the treaty related only to future acts, and did not embrace places in their possession at the time the treaty was made. This construction was rejected by the United States; they were willing to admit the British construction in the case of the Belize, provided the boundary should be satisfactorily settled; but as to the Mosquito coast and the Bay Islands, such construction would defeat the very object of the treaty.

This controversy lasted for ten years, and at times seemed perilously near precipitating a war between the two States. An

attempt was made to settle it in 1856, by a new treaty, — known as the Clarendon-Dallas treaty, — but this failed of ratification by reason of an amendment introduced by the Senate by which the Bay Islands were given absolutely to the Republic of Honduras.

On the failure of the Clarendon-Dallas treaty, there remained two possible modes of proceeding; namely, by reference to arbitration, or by the absolute abrogation of the treaty of 1850. In the opinion of the United States, said Mr. Cass, the subject did not admit of reference to arbitration. And as to the abrogation of the Clayton-Bulwer treaty, the United States would consent to this only on condition of making some other settlement of the question. For, in the event of abrogation, England insisted on resuming her former pretensions in Central America. Mr. Clayton said, "The abrogation of the treaty restores the British protectorate with renewed vigor; and unless immediately after it shall be annulled we shall be prepared to attack her in Central America, she will reassert her title so effectually that in one year the whole isthmus will be under her influence."[1] In the meantime England sent out, in 1857, a commissioner — Sir William Gore Auseley — to negotiate treaties with the Central American States, which should be in accordance with the Clayton-Bulwer treaty, and perhaps satisfy the American construction of the treaty. Mr. Cass assured the English government that the United States would be satisfied if the proposed treaties should adjust the disputes in regard to the Mosquito protectorate, the Bay Islands, and the boundary of Belize, "in accordance with the general tenor of the American interpretation of the treaty." This plan proved successful. Treaties were concluded (1) with Guatemala in 1859, by which the boundaries of Belize were determined; (2) with Honduras, in the same year, by which the Bay Islands were given up to that State; (3) with Nicaragua in 1860 (also by that with Honduras), by which the British protectorate over the Mosquitos was withdrawn.

It will be seen that the principles involved in these treaties coincide almost exactly with the American construction, and with the Senate amendments to the Clarendon-Dallas treaty. England conceded in 1860 what she flatly refused in 1856. The United States thus gained all they had contended for. Mr. Buchanan said in his annual message of December, 1860, "The dis-

[1] Appendix to Cong. Globe, 1855–1856, p. 441.

cordant construction of the Clayton-Bulwer treaty between the two governments have resulted in a final settlement entirely satisfactory to this government." Mr. Buchanan afterwards wrote, that, at the close of "his administration, no European colony existed on the American continent, except such as had been established before the Monroe doctrine was announced, or had been formed out of territory then belonging to a European power." [1]

Thus, in 1860, the Clayton-Bulwer treaty was restored to its full original authority. But the primary object for which it was made — the construction of a canal — still remained unaccomplished. The controversy over the treaty had delayed proceedings by the New York company, till the government of Nicaragua, incensed by the filibustering expeditions of Walker, revoked, in 1855, the concession to the company. The breaking out of the Civil War in 1861 arrested further action in this direction on the part of Americans. The Clayton-Bulwer treaty continued, nevertheless, to be considered as binding the two States. In a despatch to Mr. Adams, in 1866, Mr. Seward said that, "supposing the canal should never be built, it may be a question whether the renunciatory clauses of the treaty are to have perpetual obligations. Technically speaking, this question might be decided in the negative. Still, so long as it should remain a question, it would not comport with good faith for either party to do anything which might be deemed contrary to even the spirit of the treaty."

So, Mr. Fish, in a despatch of April 26, 1872, to Mr. Schenck, in regard to a rumor of British encroachment upon the territory of Guatemala, said, "You will then (if the rumor prove to be true) formally remonstrate against any trespass by British subjects, with the connivance of their government, upon the territory of Guatemala, as an infringement of the Clayton-Bulwer treaty, which will be very unacceptable in this country."

Again, on March 4, 1880, Mr. Evarts, writing to Mr. Logan, then Minister to Central America, in regard to a rumor that England was about to acquire the Bay Islands by purchase, said, "It seems unquestionable that the Clayton-Bulwer treaty precludes the acquisition of those islands by Great Britain."

After the French were forced out of Mexico, in 1866, Mr. Seward would seem to have changed his mind in regard to the

[1] Buchanan's Administration, p. 284.

Clayton-Bulwer treaty. During the period from 1868 till 1870 he attempted, by means of a new treaty with Colombia, to secure for the United States the absolute control of the transit by way of the Isthmus of Panama. But his proposals were rejected by the government of Colombia. Mr. Seward was, doubtless, influenced in his action by the remembrance of the unfriendly attitude of England and France towards the United States during the Civil War. "The United States," he said, "would not permit to a public enemy of the American continent, the use or advantages of a work executed by nations of the New World." On the other hand, Mr. Fish proposed, in 1877, with reference to the Nicaragua route, a joint action of the maritime powers in neutralizing any future canal.

In the meantime Lieutenant Wise had explored the Panama route, and in 1878 the de Lesseps Company was organized in Paris, and obtained from Colombia a grant of a right of way across its territory. The congress which met in Paris in May, 1879, decided upon a sea-level canal on the line of the Panama Railway, and the government of Colombia issued an invitation to the European powers to join in guaranteeing the neutrality of the canal when completed.

The United States were both surprised and alarmed at this turn of affairs, and were impressed with the necessity of asserting their rights in regard to these projects. In both Houses of Congress resolutions were introduced, reaffirming the principles of the Monroe doctrine, and declaring that the United States must exercise such control over any interoceanic canal as their safety and prosperity demanded. The Executive branch of the government also took the matter up. Mr. Evarts protested against the action of Colombia, and proposed to the Colombian Minister, General Santo Domingo Vila, a new treaty, supplementary to that of 1846, by the terms of which "all concessions and privileges granted or to be granted by the United States of Colombia with the view of assuring the construction of an interoceanic canal across the Isthmus of Panama are and shall be subject to the rights acquired by the United States of America by virtue of the guarantee given by them in the thirty-fifth article of the Treaty of 1846," and that no concession should be granted by Colombia without the consent of the United States. And, further, that the United States should be permitted to establish and occupy any fortifica-

tions at the entrance of the canal which should be deemed necessary. General Vila replied, in effect, on the 10th of February, 1881, that to accept the proposals of Mr. Evarts would be a serious blow to the independence of Colombia as a sovereign State, and that he could not accept the idea, even as a simple basis of discussion. A convention, in a modified form, negotiated immediately afterwards by Mr. Trescot and General Vila, was rejected by the Colombian Senate on February 17.

President Hayes had said, in a special message, dated March 8, 1880, "that the policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European power. . . . An interoceanic canal across the American isthmus will essentially change the geographical relations between the Atlantic and Pacific coasts of the United States, and between the United States and the rest of the world. It will be the great ocean thoroughfare between our Atlantic and Pacific shores, and virtually a part of the *coast line* of the United States." In his inaugural address, President Garfield made use of similar language.

It was left, however, to the successors of Mr. Seward and Mr. Evarts in the State department to sustain by argument the position of the United States in regard to the canal and the Clayton-Bulwer treaty. In a despatch to Mr. J. R. Lowell, dated June 24, 1881, Mr. Blaine calls attention to the treaty of guarantee of 1846 between Colombia and the United States, and says that, "in the judgment of the President, this guarantee, given by the United States of America, does not require reënforcement, or accession, or assent from any other power." No mention is made in this despatch of the Clayton-Bulwer treaty; but in a subsequent despatch to Mr. Lowell, of the 19th of November, 1881, Mr. Blaine discusses that treaty at great length. "This convention," he declares, "was made more than thirty years ago, under exceptional and extraordinary conditions, which have long since ceased to exist, — conditions which, at best, were temporary in their nature, and which can never be reproduced." The remarkable development of the United States since that time, Mr. Blaine believes, has created new duties upon this government, the complete discharge of which requires some essential modification of the Clayton-Bulwer treaty. For although the military power of the United States is without limit, and, in any conflict on the

American continent, altogether irresistible, this treaty commands the government not to use a single regiment of troops to protect its interests in connection with the interoceanic canal, but to surrender the transit to the guardianship and control of the British navy. To counterbalance the preponderance of the British navy, we should be permitted to fortify and control the canal in order to protect our Pacific coast in the event of war. And a comparison is made with England's Indian possessions and the Suez canal. As to a general neutralization of the canal "on paper," Mr. Blaine thinks it would not suffice to preserve its neutrality in time of hostilities. "The first sound of cannon, in a general European war, would, in all probability, annul the treaty of neutrality." The only conclusive mode of preserving the neutrality of the canal is to "place it under the control of that government least likely to be engaged in war, and able, in any and every event, to enforce the guardianship which she shall assume." Besides, we have by right and long-established claim priority on the American continent.

For these reasons Mr. Blaine proposes a modification of the Clayton-Bulwer treaty, so as to permit the United States to fortify the canal, while retaining the prohibition regarding the acquisition of territory in Central America. The eighth article, by which the two governments agree to protect the routes by way of Tehuantepec or Panama, should be considered obsolete; while that looking to the establishment of a free port at either end of the canal, and a neutralized portion of sea, should be allowed to stand.

Mr. Frelinghuysen, who succeeded Mr. Blaine at the State Department in December, 1881, reiterated the arguments of his predecessors as to the necessity of the American control of the canal; and went still farther, in his attempt to prove that the Clayton-Bulwer treaty was null and void by the acts of England, or at least, was voidable, at the pleasure of the United States. The primary object of the treaty, says Mr. Frelinghuysen, was the construction of a canal by the Nicaragua route, and the dispossession of England of her settlements in Central America. But neither of these objects was accomplished; the canal was not made, and England continued to occupy British Honduras. If "Great Britain has violated and continues to violate that provision, the treaty is, of course, voidable at the pleasure of the United States." Again,

the parties to the treaty "anticipated that a canal by the *Nicaragua route* was to be at once commenced, . . . and finished with all possible speed by American and British capital under the impulse of the joint protectorate." And it is further the opinion of Mr. Frelinghuysen that the agreement had reference to the concession of the State of Nicaragua to the American company organized in 1849, and to no other. He then intimates that the British capital was not forthcoming; and the concession was withdrawn and therefore the treaty became voidable. The sixth article, which contemplated the extension of the agreement to other nations, should be considered as lapsed by reason of the failure to construct the canal to which it referred, and also because no joint protectorate for any canal across the isthmus is required. As to the eighth article, which extends the provisions of the treaty to the Panama and Tehuantepec routes, Mr. Frelinghuysen says our protectorate over Panama, by the treaty with Colombia of 1846, is exclusive in its character, while it exists, which treaty obliges the United States to afford the sole protectorate of any transit across Panama. But, at all events, the fact that England has concurred in the protectorate of the railway on this route by the United States has relieved the last-named government from any obligation to permit her to join in the guarantee.

Mr. Frelinghuysen finds another reason for annulling the Clayton-Bulwer treaty in the fact that in 1850, when the treaty was made, the United States were poor in money; they could not furnish the necessary capital to construct the canal, and were willing, therefore, in order to secure such capital, to surrender some of their exclusive privileges. But now the people of the United States have abundance of surplus capital for such enterprises, and have no need to call upon foreign capitalists.

Finally, the Clayton-Bulwer treaty is said to be in conflict with the Monroe doctrine.

These arguments of Mr. Blaine, Mr. Frelinghuysen, and others, touching the Clayton-Bulwer treaty, we may reduce to three general propositions; namely, first, that the treaty is void or voidable by reason of the failure of England to carry out her part of the agreement; second, that the change of conditions since 1850 has worked a virtual abrogation, or, at least, an essential modification of the treaty; and third, that the treaty is in conflict with the principles of the Monroe doctrine. All these positions were

denied by Lord Granville, English foreign secretary; and they have been more recently criticised by Mr. T. J. Lawrence, in his volume of Essays on International Law.

In regard to the first of the above-mentioned propositions, that the treaty is voidable by reason of the non-performance of certain of its stipulations on the part of England, the first point made by Mr. Frelinghuysen is that England continued, contrary to the stipulations of the treaty, to exercise dominion over British Honduras — in fact, that she changed what was before a mere "*settlement*" into a "*possession.*" The declaration of Sir H. L. Bulwer before the final exchange of ratifications, that British Honduras was not to be considered as within the terms of the treaty, and Mr. Clayton's assent to that declaration, does not satisfy Mr. Frelinghuysen; for this declaration, he avers, was made "after the conclusion of the treaty by the joint action of the President and Senate, and was not made to or accepted by them." This is hardly an accurate statement of the facts, for it would seem that the Senate was not ignorant of the declaration, as the following correspondence will show: —

JULY 4, 1850.

DEAR SIR,—I am this morning writing to Sir H. L. Bulwer, and while about to decline altering the treaty at the time of exchanging ratifications, I wish to leave no room for a charge of duplicity against our government, such as that we now pretend that Central America in the treaty includes British Honduras.

I shall therefore say to him, in effect, that such construction was not in the contemplation of the negotiators or the Senate at the time of the confirmation. May I have your permission to add that the true understanding was explained by you, as Chairman of Foreign Relations, to the Senate, before the vote was taken on the treaty? I think it due to frankness on our part.

Very truly yours,

JOHN M. CLAYTON.

TO HON. W. R. KING, *U. S. Senate.*

JULY 4, 1850.

MY DEAR SIR,—*The Senate perfectly understood that the treaty did not include British Honduras.* Frankness becomes our government, but you should be careful not to use any expression which would seem to recognize the right of England to any portion of Honduras.

Faithfully your obedient servant,

W. R. KING.

TO HON. JOHN M. CLAYTON, *Secretary of State.*

The date of these notes was that on which the ratifications were exchanged, and Sir H. L. Bulwer's declaration was in the hands of

Mr. Clayton on the 29th of June — five days earlier. It can hardly be presumed that the President was ignorant of so important a matter; indeed, on the 14th of July, President Filmore said, in a communication to Congress, that "the British title to British Honduras stands precisely as it stood before the treaty." An official exposition of the treaty had appeared on the 8th of July, in the "National Intelligencer," in which it was said that "the British title to the Belize the treaty does not in any manner recognize; nor does it deny it, or meddle with it. That settlement remains, in that particular, as it stood previously to the treaty." [1]

We have already seen, in the above historical sketch of the treaty, that the United States accepted this view of its meaning at the time of the final adjustment of the dispute, in 1860. It would seem, therefore, a little late to insist now upon an interpretation of the treaty, which was expressly disavowed by the statesmen who took part in the formation of the treaty, and who insisted so tenaciously upon their construction of it in other respects.

In regard to the other points raised against the validity of the treaty by Mr. Frelinghuysen, his arguments are mainly refuted by the history of the treaty itself. The expectation that "a canal was to be commenced and finished with all possible speed by American and British capital" is not a stipulation of the treaty. That instrument simply states that "it is desirable that no time should be unnecessarily lost in commencing," etc., but no time is fixed therefor. Again, the provisions of the treaty contemplate the construction of the canal by means of private capital and private enterprise; there is no agreement, therefore, by either government to furnish capital, but only the protection of that to be invested in the enterprise by individuals.

So, of the statement of Mr. Frelinghuysen, that the agreement had reference to the American company, organized in 1849, the seventh article of the treaty declares that the two governments will give their support and protection to any company which shall have first offered to commence the construction of the canal, and presenting evidence of sufficient capital subscribed to accomplish the undertaking. The reference here is undoubtedly to the above-named American company; but if, at the end of one year, such company was not prepared to go on with the work, then the contracting parties should be free to "afford their protection to

[1] Seward's Works, 1, 384, 385.

any other persons or company that shall be prepared to commence and proceed with the construction of the said canal."

Now, neither the fact that the canal was not immediately constructed, nor that the American company referred to lost its concession from the State of Nicaragua, would seem to justify the conclusion that the Clayton-Bulwer treaty was thereby annulled, or had become voidable. That treaty contemplated a permanent and far-reaching scheme, with which no temporary interruption should be permitted to interfere. But the strongest argument in favor of the continued validity of the treaty is found in the fact that the government of the United States refused to consent to its abrogation in 1857, and in 1860 expressed its perfect satisfaction with the final settlement of the question, and continued to appeal to the stipulations of the treaty until a very recent date.

The second proposition, mainly relied on by Mr. Blaine, was, that circumstances have so changed since 1850 that the treaty entered into then ought, in justice to the United States, to be considered as modified to correspond with the new conditions. This argument it is more difficult to answer. There is, in the first place, a certain vagueness in the statement; and furthermore, it is at best largely a matter of opinion.

The presumption is, that treaties continue to bind the contracting States; and it is most essential to the interests of international intercourse that a high regard should be paid to the faith of treaties. Yet it is conceivable that circumstances should so change by lapse of time that it would be impossible to carry a treaty into effect, in whole or in part, or that to do so would be unjust and injurious to one of the signatory powers. In the former case, the treaty would become void; in the latter case, it would become voidable, if the change of circumstances were such as to endanger the existence of one of the contracting States. There is a difference of opinion, however, among writers on international law as to this latter point. The writers of continental Europe are, as a rule, inclined to look more leniently upon the breach of treaties than do those of England and the United States. Fiore goes so far as to say that "all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation, or which hinder the exercise of its natural rights." The conference of London in 1871 declare, on the other hand, that "it is an essential principle of the law of

nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement." If this stricter rule is subject to occasional exceptions in practice, yet it is safer on the whole to proclaim it as the rule than to permit one of the parties — and the interested party — to decide for itself when the occasion has arisen which calls for the abrogation of the treaty. To warrant such action there ought, at least, to be no doubt as to the injurious effect of carrying out the terms of the treaty.

In applying these principles to the Clayton-Bulwer treaty, we are led to inquire, first, whether the conditions under which it was entered into have undergone a change so radical that the complete execution of its provisions at the present time would endanger the political position of the United States or seriously menace their commercial interests. It is contended on the part of the United States that such a change has taken place; the extraordinary development of our possessions on the Pacific Coast was, it is said, unforeseen in 1850. They have become "imperial in extent, and would supply the larger part of the traffic through the proposed canal." The relative importance of a waterway between our eastern and Pacific States has increased in the same ratio; so important, it is said, has such a communication become, that, for purposes of defence and in the interests of our commerce, we must have the exclusive control of it, — and, indeed, consider it as a part of our "coast line." But by the provisions of the Clayton-Bulwer treaty, the isthmus canal would be free to all nations alike; and in the event of war with any European power, in spite of the neutrality of the canal, Mr. Blaine believes that it would be closed to us, and our western coast be exposed to hostile attack, and our commerce interrupted.

To these arguments of Mr. Blaine, Lord Granville answers, that, granting the extraordinary growth of the Pacific States of the United States, the British possessions have developed *pari passu* with those of the United States, and that the canal would be very important for them. But more important still, the canal would have an enormous political interest for all the maritime States of the world. Therefore, the United States have no greater relative interest in the canal than they had when the treaty was made. It is a mistake to suppose that the statesmen of 1850 did not

foresee the rapid development of the Pacific coast; that was, in fact, one of the motives for negotiating the treaty. Moreover, the development of ways of communication have quite kept pace with that of the Pacific States themselves. Whereas, in 1850, the only practicable routes to California were by way of the isthmus, or around Cape Horn, there are now three lines of railway across the continent, bringing San Francisco within five days of New York — about the estimated time it would take for a ship to go through the Nicaragua canal.

In the event of a hostile attack upon our western coast, troops, and war material of every kind, except ships, would be sent from the East by railway, if haste were called for, rather than by water, even if the canal were unobstructed. But let us suppose that the United States were to exercise the sole protectorate over the isthmian canal, and, for its security, were to build fortifications thereon; would it not be a simple matter for any of the greater maritime powers to blockade both ends of the canal, and thus prevent all American vessels from approaching it? Unless, therefore, the United States possessed a navy able to cope with that of other maritime States, and even with any possible combination of such States, the canal would, in time of war, be entirely useless for us. But if we possessed such a navy, it is clear, we should not need to fortify the canal. The assertion, moreover, that England would disregard the provisions of the treaty, which were expressly based upon the contingency of war between the two countries, is an unwarrantable assumption; even granting the desire to do so, England's treaty relations with other States are too important for her to set the example of bad faith towards other States. Indeed, England has been the foremost State in Europe in insisting on the faith of treaties.

But these arguments do not exhaust the objections to the Clayton-Bulwer treaty; it is said that to permit any European power to take part in protecting an isthmian canal, would be in conflict with the principles of the Monroe doctrine. The Monroe doctrine, although never anything more than a doctrine, has a strong hold upon the American mind; it has had, too, no inconsiderable restraining and moral effect upon Europe. But it is often misunderstood in this country, and may be easily misapplied.

The declaration of President Monroe, in 1823, had a definite purpose; namely to defeat the machinations of the so-called

"Holy Alliance," which, having suppressed by force of arms all popular demonstrations in Europe, proposed to transfer its activity to this continent, to restore the monarchical principle in the Spanish-American republics, and, perhaps, to attack the United States. The declaration was, therefore, a defensive measure; the European Alliance had announced a policy which was thought to be dangerous to the interests and the peace of the United States. Now the particular circumstances which called forth that declaration have passed away forever. Since that time, Europe itself has become, to a great degree, democratic; and with this change, the spirit of monarchical propagandism has ceased to exist.

The danger of European aggression has been lessened, too, by the fact that the Spanish-American States, still struggling for their independence in 1823, are now recognized republics of nearly seventy years' standing. And this is well understood in South America. The minister of foreign affairs of the Argentine Confederation said, in 1881, that "happily the day has gone by in which political combinations on this continent had for their principal object the preserving of their independence against foreign aggression and machinations. Europe no longer harbors any thought of conquest or of chimerical vindications."

It must be admitted, however, that there is a tendency on the part of several leading European States to extend their dominion in the interest of their navigation and trade. At present this tendency shows itself in the inordinate desire to plant colonies in all places not yet occupied by civilized societies; and it is by no means improbable that, did a favorable opportunity offer itself, they would attempt to gain vantage-ground on the continents or islands of this hemisphere. It ought not to be expected that the United States will be an indifferent spectator of these movements, at least, where their interests are at stake, whether it be a question of the American continents or of islands in the Atlantic or Pacific. But it is not necessary to attempt to stretch the Monroe doctrine so as to include every possible case, nor to exclude other cases from its effect. We have outgrown the Monroe doctrine, and ought to be able to have a foreign policy entirely independent of it. The United States are large in extent of territory, and strong in material resources, and stronger still in their defensive position between two oceans. There is no longer any occasion, as there was in the early part of the century, to fear those "entangling

alliances" with European powers, in regard either to European or American affairs. It was not contemplated by Washington, when he so earnestly enjoined upon his countrymen a policy of isolation, that we should always hold aloof from the rest of the world. The danger, as he saw it, would pass away so soon as the infant State should have arrived at the vigor of manhood. There would come a time, he said, when the United States could choose war or peace at their pleasure. What, then, is the sense of adhering, in the strict letter, to a policy adopted, of necessity, in the early period of our history, but the reason for which no longer exists? In this age of steam and electricity, the different countries of the world have been brought wonderfully near to one another, in comparison with fifty years ago. The United States have interests in all parts of the world, and there may come a time when they could properly exert an influence for good. Certainly it is not a time when we should adhere to a Chinese policy of exclusion in regard to the American continents.

The real danger is rather that we shall change the Monroe doctrine from a defensive into an aggressive policy; that we shall not only keep European powers away from the American continents, but that we shall revive their methods, in extending our boundaries and our dominion, or, perhaps, set up an American "Holy Alliance." When we speak of making the proposed canal our southern coast line, we go far in that direction. We should then be doing, in the supposed interests of trade, what was, at at an earlier period in our history, done in the interests of slavery. In adopting such a policy, we should, moreover, alienate the sympathies of the Spanish-American States, with their forty-five millions of inhabitants, and force them into the arms of Europe. There have been already indications of such a result. Spanish-Americans are not slow in detecting signs of aggression on our part. A Central American newspaper declared, on August 4, 1881, that "we should suffer an undeception, if the government of the United States, representing a great people, ruled by exemplary institutions, should adopt with the other sister nations of America, before the world, which looks on with lively interest, a policy, troublesome, radically egotistical, that would sacrifice the sacred principles of justice to the spirit of *mercantilism*, overpowering and dangerously developed."

A very intelligent South American, Mr. Sarmiento, then Argen-

tine minister in Washington, said, in 1866, "The Federal system is the most admirable combination which chance ever suggested to the genius of man. . . . But it is dangerous to convert the Federal system into an invading republic, swallowing ever, without being able to digest. The experiment has never succeeded. . . . The Monroe doctrine must be purified of all the stains by which the hand of man has dimmed its lustre. . . . The United States ought to say that it is the country which lies between two oceans and two treaties; and the day after it has said so, the Monroe doctrine will be accepted by the international law of Europe, thus removing the greatest source of present peril." [1]

Now, as to the much-maligned Clayton-Bulwer treaty, what have been and what are its dangers or disadvantages for us? In the first place, its restrictive clauses have effected all that the makers of the treaty expected of them; they have kept Central America from falling under the dominion of England,— a fact of the first importance. Having gained this great object, it would seem hardly just to say to England now: "We have no longer any need of the treaty; we can look after the canal ourselves." England might very well reply, as in 1857, that, in that case, she should insist upon being placed in the same position in Central America which she occupied before the treaty was made. But, aside from this consideration, the Clayton-Bulwer treaty probably offers the best possible solution of the canal question, namely, in the clause which contemplates the invitation to all interested States to join in the protectorate of the canal; in other words, the neutralization of the canal. By the adoption of this plan, the United States would gain all the advantages which a canal would offer, and without the necessity of keeping on foot an enormous navy, or of entering generally upon a career of militarism, which is at this moment the calamity and the danger in European nations. As Dr. Wharton pointed out: "Such an international agreement entered into by all the great powers, would not be in conflict with the Monroe doctrine. For an agreement that no powers whatever should be permitted to invade the neutrality of an isthmus route, but that it should be absolutely neutralized so as to protect it from all foreign assaults by which its freedom should be imperilled, is an application, not a contravention, of the Monroe doctrine. Such an agreement is not an approval of, but an exclusion

[1] Discourse before the Rhode Island Historical Society, 1866.

of foreign interposition." [1] There would probably be no objection on the part of European States to the United States taking a leading part in the management of the canal; that would be a natural consequence of our position.[2]

On the other hand, if we set aside the Clayton-Bulwer treaty, and attempt an exclusive control of the canal, we shall encounter many difficulties. More than half the world is interested, politically or commercially, in the isthmian canal; and it is more than probable that all the maritime States of Europe and America would combine to oppose our exclusive control of it. In the case of the Panama route, moreover, the sole basis of our claim is the thirty-fifth article of the treaty of 1846 with Colombia, which may be abrogated at any time by a twelvemonth's notice on the part of Colombia, and thus leave us without the semblance of a legal right to a protectorate over that route. In regard to the Nicaragua route, it is said that we should be able to control it by annexing Mexico and a part of Central America. Herein lies the real danger of such a policy; and the warning of Mr. Sarmiento applies to it. To take into our Union twelve millions of people, of a race totally different from ours in temperament, in traditions and laws, in capacity for self-government, and in their habits and religion, would introduce an element of discord and perpetual trouble, which it would be the part of wisdom to avoid. And it would be avoided by the neutralization of any future isthmian canal.

This discussion has turned mainly on the question of expediency, — what would be for the best interests of the United States? A broader view of the subject was taken by many of the earlier statesmen of this country; and that view was also expressed by President Cleveland in his first annual message, when he said: "Whatever highway may be constructed across the barrier dividing the two greatest maritime areas of the world must be for the world's benefit, a trust for mankind, to be removed from the chance of domination by any single power, nor become a point of invitation for hostilities, or a prize for warlike ambition. An engagement, combining the construction, ownership, and operation of such work by this government, with an offensive and defensive

[1] Digest of International Law, II, 243.

[2] The argument of Mr. Blaine as to England's control of the Suez canal has, of course, turned against him, since, by the joint action of the European powers, on the 29th of October, 1888, that canal has been neutralized.

alliance for its protection, with the foreign State whose responsibilities and rights we should share, is, in my judgment, inconsistent with such dedication to universal and neutral use, and would, moreover, entail measures for its realization beyond the scope of our national polity or present means."

Freeman Snow.

CAMBRIDGE.

STATUTORY REVISION.

IMPORTANT problems in the science of law arise to-day from the great and constant increase in the authoritative literature of the subject. In respect to case law there has been much discussion of the possibilities of abridgment by codification; but codification has not as yet, either in England or in this country, gone far beyond the stage of discussion; at least there has been no serious attempt on any considerable scale to make a codification which shall undertake to dispense with existing reports.

The difficulties which arise from the increase of reports are met, first, by a higher classification in the later digests, and, secondly, by the development of a class of elaborate text-books devoted to narrow heads of the law. It is often easier to-day, by the aid of the best text-books and of the highly classified new English digests, to find the decisions upon a given point from out the vast library of English reports, than to find the law on the same question in the reports of one of our States.

In spite of numberless propositions to the contrary, made through a long series of years, England has pursued, with reference to the great body of her statute law, the same course which she has followed with regard to case law; that is to say, she has not cut across the regular flow of legislation by statutory codification. In certain subjects redrafts of existing legislation have been made; but as to the great mass of the statutory law of England, one must either look to the unofficial compilations on different subjects, or else, by the aid of the modern statute tables and indexes, seek to ascertain for himself, from the whole course of legislation, what is the statute law upon a given subject.